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Reconstructing the Responsibility To Protect in the Wake of Cyclones and Separatism

Jarrod Wong*

This Article reconceptualizes the doctrine of the responsibility to protect (R2P). R2P provides that when a government fails to protect its citizens from genocide, war crimes, ethnic cleansing or crimes against humanity ("mass atrocities"), that responsibility shifts to the international community acting through the United Nations.

The U.N.'s apparent failure to include natural disasters in the catalogue of harms potentially justifying R2P intervention generated considerable controversy following Myanmar's refusal of foreign aid following the devastation wrought by Cyclone Nargis. Those seeking to limit the scope of R2P considered it inapplicable in the case of Myanmar, reading the U.N.'s focus on mass atrocities as a conscious decision to exclude natural disasters as triggers for R2P. By contrast, supporters of R2P looking to rely on the doctrine to compel Myanmar to accept aid have argued that there is no meaningful distinction between the failure to protect following natural disasters and the failure to protect from mass atrocities.

This Article shows that the causes of the harm are irrelevant. Developing what it labels a "constructive interpretation" of R2P, the Article demonstrates that R2P applies equally to a state's failure to protect its population from harm caused by its omission to act when that omission constitutes a crime against humanity. This thesis is advanced through the novel application of fundamental criminal law principles to the regime of international human rights,

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and includes a discussion of the extent to which the concept of crimes against humanity can be deployed where the harm to a civilian population comes about by means of inaction rather than action.

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I. INTRODUCTION

On May 2, 2008, the full fury of Cyclone Nargis struck Myanmar, causing immense damage and human suffering, including an estimated death toll of 78,000 with an additional 56,000 people missing. The already dire situation deteriorated further as the Myanmar regime trenchantly refused to allow a significant amount of foreign aid to reach victims. While the international community stood ready and literally at Myanmar’s doorstep to deliver aid, its hands were tied as long as the government exercised its sovereign right to refuse entry into its territory.

As much out of urgency as of outrage, French Foreign Minister Bernard Kouchner raised the possibility of the United Nations (U.N.) implementing the doctrine of the responsibility to protect in order to authorize the imposition of the delivery of aid notwithstanding the junta’s resistance. The United Nations endorsed the groundbreaking doctrine of the responsibility to protect at the U.N. Sixtieth Anniversary World Summit in 2005 (U.N. Summit), one of the largest gatherings of heads of state and government in history. Widely referred to as R2P, the doctrine provides that where sovereign governments are manifestly failing to discharge their primary responsibility to protect their populations from “genocide, war crimes, ethnic cleansing and crimes against humanity,” that responsibility shifts to the wider international community acting through the United Nations. As conceived, R2P encompasses three distinct but related commitments: the responsibility to prevent, the responsibility to react, and the responsibility to rebuild. A contentious but crucial element of the doctrine is that it authorizes the use of force, although only as a last resort and then only if sanctioned by the U.N. Security Council.

In invoking R2P in the Myanmar crisis, Kouchner unleashed a storm within a storm of debate that revolved around the seemingly

6. See Summit Outcome Document, supra note 4, para. 139.
obvious but, as it turns out, fatally misleading question of whether R2P applies to natural disasters per se. Critics who opposed applying R2P to the Myanmar crisis noted that the doctrine was designed to address situations involving the perpetration of mass atrocities, like the genocide in Rwanda, and not natural disasters; and further that the United Nations had considered but rejected including natural disasters within the scope of R2P. In their view, the result would be to open the door to justifying all manner of humanitarian intervention, and thereby destroy the legitimacy of R2P.

In contrast, those in support of applying R2P in Myanmar contended that it made no moral sense to distinguish between withholding aid in natural disasters and refusing to help in situations of armed conflict when the end result was the same: serious and irreparable harm to the population. To determine that R2P is inapplicable simply because a natural disaster was involved would effectively neuter the doctrine, and thereby reduce it to an empty letter.

However, while both sides make compelling points, the premise of the exchange itself is fundamentally flawed insofar as it turns on the concept of natural disasters. R2P applies, if at all, because of the state's intentional failure to protect its citizens from harm in the aftermath of the natural disaster; and not because of the deaths immediately caused by the natural disaster. In other words, if Myanmar could but did not prevent the continuing large-scale loss of life in the wake of the cyclone, then R2P is potentially applicable, because such deliberate inaction itself arguably amounts to a crime against humanity under international law.

The debate is at once larger and more profound than an isolated inquiry into natural disasters and calls for radical reframing. Accordingly, this Article proposes the adoption of an alternative analytical framework based on what I call the "constructive interpretation" of R2P. Under this interpretation, R2P applies not just to a government's failure to protect its people from affirmatively

7. See discussion infra Part V.A.1.
8. See discussion infra Part V.A.1, B; see also Ramesh Thakur, To Invoke or Not To Invoke R2P in Burma, HINDU, May 20, 2008, available at 2008 WLNR 9452749 ("[A]ny effort to invoke R2P formally in the Security Council [without the assent of Myanmar's Asian neighbors] would have the counter-productive effect of damaging R2P permanently... ").
9. See, e.g., Lloyd Axworthy & Allan Rock, Responsibility To Protect? Yes, GLOBE & MAIL, May 9, 2008, at A22 ("What is the moral distinction between closing the door of rescuing people from death by machete and closing the door of life-saving aid?").
10. See id.
perpetrated mass atrocities, but also from harm based on *omission* where the government’s failure to act also constitutes a crime against humanity under international law. Thus, R2P potentially applies to the Myanmar crisis because when a state fails to act to secure the physical safety of its people in the aftermath of a natural disaster, that omission, if sufficiently egregious, constitutes a crime against humanity.

Significantly, this Article will demonstrate that the constructive interpretation of R2P is grounded in prevailing international criminal jurisprudence, which has recognized that an omission may be the basis of a finding of a crime against humanity. There is, in other words, no need to sanction natural disaster situations as a new and independent basis for invoking R2P. Rather, natural disaster situations that warrant intervention already fall within a self-defined basis for the invocation of R2P, namely the failure of a government to protect its population from a crime against humanity.

Given the fragile consensus supporting R2P, the importance of staying within the boundaries of the doctrine as drawn up in 2005 cannot be overstated. Notwithstanding the endorsement of R2P at the U.N. Summit, developing countries continue to be deeply skeptical that the doctrine is merely a cover for neo-imperialism and that it exists to serve the hegemonic, even expansionist, ambitions of dominant world powers. A startling reminder that this remains very much a live issue came shortly on the heels of the Myanmar crisis. In August 2008, when Georgia sought to suppress a separatist movement in South Ossetia, a formerly autonomous region within Georgia, Russia responded with airstrikes on Georgian positions, not just in South Ossetia but also in Abkhazia, in the name of Russian citizens who lived in those regions. Specifically, Russian Foreign Minister Sergei Lavrov argued that Russia’s use of force was an exercise of its responsibility to protect “the life and dignity of Russian citizens” in South Ossetia and Abkhazia.

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As described in more detail below, it is uncontroversial that Russia’s actions are indefensible under R2P. Among other reasons, the long-standing tension between the two countries suggests that Russia was acting not out of concern for civilians in South Ossetia and Abkhazia, but to intimidate the Georgian military and government and consolidate control over those regions. Not only is R2P inapplicable to the Russian intervention as such, its invocation in this situation is positively harmful to the doctrine’s development as an emerging norm of international law because it would bear out the very fears that developing countries hold regarding the potential for abuse of the doctrine.

Because the constructive interpretation of R2P stays faithful to its definition, it tempers the concerns regarding abuse while providing a means of intervening in otherwise desperate situations involving grave harm by omission. In keeping the focus on the issue of the intentional failure to act rather than natural disasters, the constructive interpretation also lends R2P greater coherency and moral authority, yet preserves its bite. Further, as this Article will show, the safeguards inherent in both the definition and the mode of operation of the doctrine will prevent R2P from overreaching, and the resulting formulation of R2P, while broader, could paradoxically foster greater support for the doctrine and secure its use in any future crisis that calls for it.

Part II explores briefly the history of R2P. Parts III and IV describe and analyze the invocation of R2P in the Georgia-Russia conflict and in the Myanmar crisis, respectively. Part V sets out and defends the core thesis of this Article that R2P should also apply in any situation where the state has failed to protect its people from large-scale serious harm based on omission and where the failure to act also constitutes a crime against humanity under international law. In that process, it makes both the legal and political case for supporting the constructive interpretation of R2P. Finally, this Article concludes by noting the larger implications of such an interpretation, including that R2P could potentially apply beyond the context of natural disasters and could extend, for instance, to situations involving environmental disasters or global pandemics.

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13. See discussion infra Part III.
14. See discussion infra Part III.
15. See discussion infra Part III.
16. See discussion infra Part V.A.2.
17. See discussion infra Part V.A.2., B.
II. BRIEF HISTORY OF THE DOCTRINE OF THE RESPONSIBILITY TO PROTECT

A. Origins of R2P

The doctrine of the responsibility to protect arose in the wake of the mass killings occurring in the last decade of the twentieth century, including in Somalia, Rwanda, and Srebrenica, which betrayed in painful detail the inadequacy of the international legal order to deal with imminent and then actual, continuing episodes of genocide and ethnic cleansing.18 Most dramatically, the international community simply stood by as 800,000 Rwandan Tutsi were violently massacred over a period of a hundred days in 1994.19 While such events aroused world anger and shame, “humanitarian intervention” has been controversial not only when it has failed to happen, but also when it has occurred.20 In 1999, U.S.-led NATO forces bypassed the Security Council and began a massive bombing campaign to prevent the threatened annihilation of the Albanian population in Kosovo by the Serbian army.21 The intervention ultimately secured the withdrawal of the Serbian forces, but not before intensifying the fighting on the ground and killing over a thousand people, five hundred of whom were civilians.22

Thus, while these events galvanized support to find a reasoned and sanctioned means for intervening to halt future mass atrocities, the solution proved elusive as various groups in the international community differed on whether and to what extent intervention should be permitted:

19. See ICISS REPORT, supra note 5, at VII; Matthews, supra note 18, at 139; Nanda, supra note 18, at 365-66.
20. ICISS REPORT, supra note 5, at 1.
21. Id.
22. INT’L CRIMINAL TRIBUNAL FOR THE FORMER YUGO. (ICTY): FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA (June 8, 2000) paras. 53, 90, reprinted in 39 I.L.M. 1257, 1272, 1282; see also Human Rights Watch, Civilian Deaths in the NATO Air Campaign—The Crisis in Kosovo para. 26 (2000), http://www.hrw.org/reports/2000/nato/Natbm200-01.htm (estimating that between 489 and 528 civilians were killed during NATO’s bombing campaign).
For some, the international community is not intervening enough; for others it is intervening much too often. For some, the only real issue is in ensuring that coercive interventions are effective; for others, questions about legality, process and the possible misuse of precedent loom much larger. For some, the new interventions herald a new world in which human rights trumps state sovereignty; for others, it ushers in a world in which big powers ride roughshod over the smaller ones, manipulating the rhetoric of humanitarianism and human rights.33

Undeterred, Kofi Annan, then Secretary-General of the United Nations, began pushing for the codification of a doctrine that would entrust the international community with the right and responsibility to intervene in response to a humanitarian crisis.24 In addressing the 1999 General Assembly, he “called on Member States to unite in the pursuit of more effective policies to stop organized mass murder and egregious violations of human rights.”25 His central idea revolved around the distinction between state sovereignty and individual sovereignty:

State sovereignty, in its most basic sense, is being redefined by the forces of globalization and international cooperation. The State is now widely understood to be the servant of its people, and not vice versa. At the same time, individual sovereignty—by this I mean the human rights and fundamental freedoms of each and every individual as enshrined in our Charter—has been enhanced by a renewed consciousness of the right of every individual to control his or her own destiny....

... Nothing in the Charter precludes a recognition that there are rights beyond borders.26

23. ICISS REPORT, supra note 5, at 1-2.
24. See GARETH EVANS, UNDERSTANDING THE RESPONSIBILITY TO PROTECT 37 (2008) (“Toward the end of the 1990s, UN Secretary-General Kofi Annan made a major attempt to resolve the conceptual impasse at the heart of the sovereignty-intervention debate....”).

State sovereignty, in its most basic sense, is being redefined—not least by the forces of globalization and international co-operation. States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty—by which I mean the fundamental freedom of each individual, enshrined in the charter of the UN and subsequent international
Instead of resolving the impasse, however, his comments excited yet more controversy.\textsuperscript{27} While Annan had sought to emphasize that any resulting intervention could embrace a whole gamut of responses from diplomacy to armed action, the latter possibility attracted disproportionate attention.\textsuperscript{28} The concept was met with resistance by states that perceived such intervention to be at best, an infringement of their sovereignty, and at worse, a Trojan horse that would allow for neo-imperialism, legitimating the invasion of the global South by Western powers.\textsuperscript{29}

Part of the problem lay in the fact that the debate concerning the use of force across borders to save civilian lives was conducted primarily in terms of “humanitarian intervention,” a phrase much (mis)used since at least the nineteenth century, and thereby bogged down by the weight of history.\textsuperscript{30} Throughout this time, “[H]umanitarian interventions have often been treated as suspect because they may be used as mere vehicles for national aggrandizement, imposition of puppets in power, or for the institution of political and economic systems detested by the indigenous population.”\textsuperscript{31}

The turning point for this extended discussion finally came about in 2001 with the publication of the influential report “The Responsibility to Protect” by the International Commission on Intervention and State Sovereignty (ICISS), an independent panel sponsored by the Canadian Government (ICISS Report).\textsuperscript{32}

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\textsuperscript{27} See Millennium Report, supra note 25, at 47-48 (noting the resulting furor).\textsuperscript{28} See id.\textsuperscript{29} See id.\textsuperscript{30} See INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, supra note 5. See generally T. Modibo Ocran, The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping, 25 B.C. INT’L & COMP. L. REV. 1 (2002).\textsuperscript{31} Ocran, supra note 30, at 1. While there had been prior intervening efforts to recast the debate, they did not get much traction. For instance, Francis Deng, at the time the Representative of the Secretary-General on internally displaced persons, and his colleagues at the Brookings Institution espoused a conceptually distinct approach based on the notion of “sovereignty as responsibility,” most comprehensively laid out in his 1996 treatise titled “Sovereignty as Responsibility: Conflict Management in Africa.” See S-G Report on R2P, supra note 3, para. 7, n.1.\textsuperscript{32} ICISS REPORT, supra note 5.
\end{flushright}
B. The Doctrine of R2P

After a comprehensive study of the issue of humanitarian intervention, the ICISS Report set out a proposal that reframed the “right to intervene”—and therefore the hitherto intractable debate—in terms of the more palatable “responsibility to protect.”33 As reconfigured, the concept of R2P is premised affirmatively on the state-centered “responsibility” of sovereignty rather than a third party’s “right” to intervene in that state’s affairs.34 Specifically, R2P asserts that “the primary responsibility for the protection of its people lies with the state itself,” and that it is only when “the state in question is unwilling or unable to halt or avert [serious harm to its population that] the principle of non-intervention yields to the international responsibility to protect.”35

More broadly, the ICISS Report conceives of R2P as encompassing three responsibilities: that of preventing, reacting, and rebuilding.36 R2P is first and best served by a commitment to the prevention of “deadly conflict” at all levels of society,37 which vitally includes the creation and maintenance of an “early warning” system.38 In the absence or failure of such preventive efforts, and where the state is unable or unwilling to protect its people, the international community must then bear the responsibility to react in the face of compelling need for human protection.39 The ensuing response may take the form of coercive political, economic, or judicial measures, and in extreme cases, can even include military action.40 Finally, where there has been a military intervention, the international community would also bear the responsibility to rebuild a durable peace, promoting good governance and sustainable development in the process.41

Significantly, the ICISS Report emphasizes that in discharging the responsibility to react, the international community must consider the full range of responsive measures available, starting with the least intrusive and coercive measures and ratcheting them up only as

33. Id.
34. Id.
35. Id. at XI.
36. Id.; see also Matthews, supra note 18, at 140-43.
37. ICISS REPORT, supra note 5, at XI, 19 (“Prevention is the single most important dimension of the responsibility to protect . . . .”).
38. Id. at 21-23.
39. Id. at 29.
40. Id.
41. Id. at 39.
needed. Consistent with this principle, military intervention should be considered only in extreme cases and as a last resort. Specifically, the ICISS Report proposes that the use of force be justified under R2P only when six criteria are met: (1) just cause: a situation that entails serious and irreparable harm in the form of a "large scale loss of life" or "large scale ‘ethnic cleansing,'" (2) right intention: a good faith desire to alleviate human suffering; (3) force as a last resort: the exhaustion of all peaceful and diplomatic processes before military force is used; (4) proportional means: the use at all times of the minimum amount of force necessary to achieve objectives; (5) reasonable chance of success: the intervention is not likely to make things worse than they were; and (6) right authority: prior approval from the Security Council with the understanding that each Permanent Five member will agree not to use its veto where its vital interests are not involved; or failing such approval, the emergency consideration of the matter by the General Assembly under the "Uniting for Peace" procedure or action by the relevant regional or sub-regional organization under Chapter VII of the Charter and subject to their seeking subsequent authorization from the Security Council.

C. The Endorsement of R2P by the U.N.

Two years after the publication of the ICISS Report, and in the lead-up to the U.N. Summit in 2005, Kofi Annan, as U.N. Secretary-General, established a High-Level Panel to "recommend clear and practical measures for ensuring effective collective action, based upon a rigorous analysis of future threats to peace and security." While the resulting 2004 High-Level Panel Report was far broader in scope than the ICISS Report, the former gave its seal of approval to many of the core principles expressed in the latter with respect to R2P, noting that "[t]he Panel endorses the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious

42. Id. at 29-30.
43. Id. at 29-32.
44. Id. at XII, 32-37, 47-55.
violations of humanitarian law which sovereign governments have proved powerless or unwilling to prevent.\textsuperscript{46}

In his own report, which was distributed in March 2005 to the General Assembly prior to and in anticipation of the U.N. Summit later that year, Kofi Annan incorporated all of the High-Level Panel Report's recommendations on R2P.\textsuperscript{47}

What followed were months of back-door wrangling in New York, and while the U.N. Summit—billed as the largest gathering of world leaders in history involving as it did some 150 heads of state and government—ultimately proved to be a disappointment to those seeking an overhaul of the U.N. system, it did result in the endorsement of R2P.\textsuperscript{48} The Summit Outcome Document's articulation of the doctrine, however, spanned just two paragraphs and did not otherwise incorporate the ICISS Report:

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and

\textsuperscript{46} See id. at 45 (quoting High-Level Panel on Threats, Challenges, & Change, supra note 45).


\textsuperscript{48} See In Larger Freedom, supra note 47, ¶ 135.
international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.\(^49\)

As a result, it is not entirely clear to what extent, if any, the United Nations' R2P doctrine incorporates issues discussed in the ICISS Report with which it is not inconsistent. Significantly for our purposes, while the ICISS Report explicitly applies R2P to natural disaster situations,\(^50\) the United Nations resolution speaks only in limited terms about the responsibility to protect against "genocide, war crimes, ethnic cleansing and crimes against humanity."\(^51\) Additionally, the Summit Outcome Document provides no guidance on the threshold criteria for military intervention beyond citing the need to first seek resolution through peaceful and diplomatic means.\(^52\) It does, however, contemplate the possibility of the use of force under R2P, but only if sanctioned by the Security Council.\(^53\)

Following the U.N. Summit, the Security Council in April 2006 officially endorsed R2P by passing Resolution 1674, which "[r]eaffirms the provisions . . . of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."\(^54\)

**D. The Current Status of R2P and Its Application in Darfur**

While R2P has succeeded in moving the debate on civilian protection beyond the impasse of humanitarian intervention, the underlying tension between state sovereignty and R2P nonetheless remains, particularly when the latter calls for military intervention. Any resistance to R2P on that ground is further compounded by the conspicuous lack of guidance on the issue in the Summit Outcome Document, in stark contrast to the ICISS Report. Perhaps not

\(^{49}\) Summit Outcome Document, supra note 4, paras. 138-39.

\(^{50}\) Thakur, supra note 8 ("[W]e cannot ignore the significance of the exclusion of natural and environmental disasters . . . ."); see also discussion infra Part VA.1. Compare ICISS REPORT, supra note 5, para. 4.20 (defining its version of R2P as applicable to "overwhelming natural or environmental catastrophes, where the state concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened"), with Summit Outcome Document, supra note 4, ¶¶ 138-139.

\(^{51}\) Summit Outcome Document, supra note 4, ¶ 139.

\(^{52}\) See id.

\(^{53}\) See id.

surprisingly, the resulting uncertainty about its implementation has translated into a tentativeness on the ground, at least in the case of the persisting humanitarian crisis in Darfur, which is widely seen as the test case for the international community's acceptance of R2P.\footnote{55} Since 2003, the Sudanese government has backed an armed militia—the Janjaweed—in a systematic and brutal campaign against the people of Darfur, a region in Western Sudan.\footnote{56} The conflict is rooted in a longstanding dispute over resources between the region's farmers and herders,\footnote{57} and more immediately grew out of the opposition of rebel groups, notably the Sudan Liberation Army and the Justice and Equality Movement, to the Sudanese government for its perceived political marginalization of non-Arabs in Darfur.\footnote{58} In response, the Sudanese armed forces and the Janjaweed, a government-supported militia made up primarily of fighters of Arab descent, have attacked the civilian population in Darfur for allegedly aiding the rebels.\footnote{59} That the actions of the Sudanese forces and the Janjaweed amount to mass atrocities and thus fall within the scope of R2P is clear. The catalog of crimes perpetrated against the people of Darfur include “the bulldozing and burning of villages, arrests and extrajudicial execution, kidnapping, torture, and rape.”\footnote{60} To date, several hundred thousand people have been killed or badly injured.\footnote{61} Additionally, the conflict has displaced some 2.7 million people,\footnote{62} many of whom live in refugee camps in neighboring Chad, and more than 3.5 million people are reliant on international aid for survival.\footnote{63} Further, notwithstanding the signing of a series of ceasefire and peace agreements, there has been an increase in violence in the region,

\footnote{55. See, e.g., Emma McClean, The Responsibility To Protect: The Role of International Human Rights Law, 13 J. CONFLICT & SECURITY L. 123, 142 (2008) (“[T]he situation in Darfur, in particular the responses of the UN and the AU, is often cited in the literature as the litmus test for the responsibility to protect framework.”); Irene Khan, Kenneth Roth & Gareth Evans, Joint Letter to the U.N. Security Council (May 24, 2006), available at http://hrw.org/english/docs/2006/05/25/sudan13462.htm; Matthews, infra note 18, at 144.}

\footnote{56. Human Rights First, About the Crisis, http://www.humanrightsfirst.org/international_justice/darfur/about/background.asp (last visited Oct. 3, 2009).}

\footnote{57. See id.; Matthews, infra note 18, at 144.}

\footnote{58. See Human Rights First, supra note 56.}

\footnote{59. See id.}

\footnote{60. See id.}

\footnote{61. See id.}


\footnote{63. Human Rights First, supra note 56.}
including credible allegations of torture and attacks on civilians by signatories and nonsignatories alike.\textsuperscript{64} In short, the crisis continues unabated, even though the Security Council has repeatedly invoked R2P in this situation.

Even before the U.N. Summit, the Security Council had sought to resolve the Darfur conflict, having created the United Nations Mission in Sudan (UNMIS) to work with the African Union Mission in Sudan (AMIS), which had been created in turn by the African Union (AU) for the primary purpose of establishing peace in Darfur.\textsuperscript{65} Following its general endorsement of R2P in Resolution 1674 in April 2006,\textsuperscript{66} the Security Council invoked the doctrine for the first time on May 16, 2006, by passing Resolution 1679.\textsuperscript{67} Resolution 1679, which explicitly recalled Resolution 1674, called for the transition of military operations from AMIS to UNMIS,\textsuperscript{68} which had become necessary once AMIS proved unable to contain the violent situation due to a lack of resources and manpower.\textsuperscript{69} Resolution 1679 was followed three months later by Resolution 1706, which also specifically recalled Resolution 1674 in detailing the nature of the U.N. force replacing AMIS,\textsuperscript{70} thereby constituting the second invocation by the Security Council of R2P regarding Darfur.

The transition, however, was conditioned on the consent of the Sudanese government, which quickly rejected the proposal to deploy U.N. forces in Darfur. Almost an entire year went by before the U.N. Security Council issued another resolution on April 30, 2007, Resolution 1755, in which the Council reaffirmed R2P in extending the mandate of UNMIS, although this brought it no closer to securing consent from Sudan.\textsuperscript{71} It was not until July 2007 that Sudan relented, and the U.N. Security Council passed resolution 1769 authorizing the deployment of a 26,000-strong joint “AU/UN Hybrid operation in Darfur (UNAMID).”\textsuperscript{72} In 2008, the U.N. Security Council passed Resolutions 1812 and 1828, extending the mandate of UNMIS and

\begin{itemize}
\item[66.] See S.C. Res. 1674, \textit{supra} note 54 and accompanying text.
\item[68.] See \textit{id.}
\item[69.] See Khan et al., \textit{supra} note 55.
\end{itemize}
UNAMID respectively, both of which reiterated a commitment to R2P.\(^3\)

No sooner had the Council passed these resolutions, the Sudanese government began to obstruct the deployment of UNAMID troops by: (1) failing to approve formally the list of UNAMID troop pledges for more than two months; (2) refusing contributions of non-African troop units from Nepal, Thailand, and Nordic countries; (3) failing to provide land for bases; (4) inserting unreasonable standards in the “Status of Forces Agreement,” which governs the relationship between the United Nations and Sudan; (5) refusing to grant permission for UNAMID forces to fly at night; (6) imposing curfews on peacekeepers in certain areas; and (7) objecting to the change from African Union green berets and helmets to the blue berets and helmets of the United Nations.\(^4\)

The result, as the Deputy Permanent U.S. Representative to the United Nations, Alejandro Wolff, remarked at the U.N. Security Council meeting leading to Resolution 1828 (2008), was that

one year after the adoption of resolution 1769 (2007), UNAMID has barely begun to complete its vital mission. Deployment now stands at just over 9,000 troops and police officers—not even half of authorized levels. UNAMID’s slow deployment is seriously interfering with its ability to protect itself and to fulfill its mandate in Darfur. The Security Council has sought to end the suffering of the people of Darfur, but we have fallen far short of our responsibility to protect them.\(^5\)

Although the consistent reference to R2P in these U.N. Security Council resolutions on Darfur potentially bolsters the status of R2P as an emerging norm of international law, the painful reality of its ineffectual implementation also highlights the vulnerability of the doctrine at this early stage of its development. Notwithstanding the multiplicity of resolutions invoking R2P, egregious human rights abuses that fall squarely within the scope of the doctrine continue in Darfur, and what U.N. action there has been has simply failed to halt the killing.\(^6\) Under these circumstances, there is the very real danger


that R2P, instead of serving as the clarion call to the international community to protect civilians from mass atrocities, will be reduced to a mere slogan for relegation to the realm of historical curiosities of international law. As a recent 2009 report by the U.N. Secretary-General on R2P acknowledged, “Most visibly and tragically, the international community’s failure to stem the mass violence and displacements in Darfur . . . has undermined public confidence in the United Nations and our collective espousal of the principles relating to the responsibility to protect.”

The 2009 report was generated in response to paragraphs 138 and 139 of the Summit Outcome Document, heeding their call to “the General Assembly to continue consideration of the [principle of the] responsibility to protect” in order to operationalize R2P. The report outlines a three-pillar strategy for advancing the R2P agenda that focuses on the general protection responsibilities of the State (pillar I), international community assistance and capacity-building (pillar II), and the specific responsibility of states to mount a timely and decisive response where appropriate (pillar III).

The strategy stresses the value of prevention and, when it fails, of early and flexible response tailored to the specific circumstances of each case. There is no set sequence to be followed from one pillar to another, nor is it assumed that one is more important than another. Like any other edifice, the structure of the responsibility to protect relies on the equal size, strength and viability of each of its supporting pillars. The report also provides examples of policies and practices that are contributing, or could contribute, to the advancement of goals relating to the responsibility to protect under each of the pillars.

The report thus seeks to give content to the broad mandate of paragraphs 138 and 139 and takes a positive, if small step, towards operationalizing R2P.

The difficulty of implementation is not, however, the only controversy surrounding the doctrine. Two similarly cataclysmic events took place in 2008 that called into question the proper scope of

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77. See generally Thakur, supra note 8 (stating R2P risks are being diminished by underuse in the case of genuine human suffering).
78. S-G Report on R2P, supra note 3, para. 60.
79. Summit Outcome Document, supra note 4, ¶ 139.
81. Id.
82. Id. at 2.
R2P: the Georgia-Russia conflict over South Ossetia and the arrival of Cyclone Nargis in Myanmar. While the debate about R2P in the Darfur crisis centered on the translation of principle into action—there being no question that the principle applied on all fours to the situation—these two events in 2008 brought into focus the separate question of when and under what circumstances the responsibility to protect is triggered, if at all. This Article will explore this question below as it addresses in turn the issues surrounding the invocation of R2P in the Georgia-Russia conflict and in the Myanmar crisis.

III. THE INVOCATION OF R2P IN THE GEORGIA-RUSSIA CONFLICT

R2P is not only at risk of diminishment from underuse in situations of genuine human suffering that warrant its application, but also, as Russia's attempted reliance on R2P to justify its military actions in Georgia reflects, from its arrogation to serve the illegitimate expansionist ambitions of stronger powers. As the discussion below makes clear, there is little doubt that Russia's invocation of R2P is misplaced and, if nothing else, serves as a cautionary reminder that the old deep-seated tension between the concept of "humanitarian intervention" and the idea of state sovereignty lurks just beneath the surface of R2P and could well upend the doctrine if such misguided efforts are not swiftly and categorically rebuffed.

A. Brief History of the Georgia-Russia Conflict

The relationship between modern-day Georgia and South Ossetia has long been strained over the latter's ambitions of independence. Their uneasy alliance dates back to the early part of the twentieth century and continued after the Red Army made South Ossetia an autonomous region of Soviet Georgia in 1921. More recently, after Georgia declared its own independence from the Soviet Union in 1990, Georgian President Gamsakhurdia repressed South Ossetian efforts to join Russia, triggering conflict that led to an estimated 2000 to 4000 deaths and displaced people in the tens of thousands. Following the collapse of the U.S.S.R. in 1992, the Russian Federation threatened to allow South Ossetia to reunite with North Ossetia if any civilians were killed in South Ossetia. Russia later negotiated a

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83. INT'L CRISIS GROUP, supra note 11, at 2-3; NICHOL, supra note 11, at 1.
84. NICHOL, supra note 11, at 2-3; Roy Allison, Russia Resurgent? Moscow's Campaign to 'Coerce Georgia to Peace,' 84 INT'L AFF. 1145, 1146 (2008).
ceasefire, however, which created a joint peacekeeping operation with joint Russian-Ossetian-Georgian patrols.\(^{85}\)

Although Georgia and South Ossetia subsequently experienced a period of relative peace, Russia began on the quiet to distribute passports to many South Ossetians and Abkhazians, and in 2001, Eduard Kokoiti, a Russian citizen of South Ossetian origin, was elected president of South Ossetia.\(^{86}\) As a result of these events, Georgia “believed Russia to be pursuing a process of de facto absorption of South Ossetia (and also the region of Abkhazia, through parallel processes) into Russia.”\(^{87}\)

Shortly after Georgians elected President Mikheil Saakashvili in 2004 following the “Rose Revolution,” Saakashvili increased Georgian troops in South Ossetia consistent with his pledge to tighten control over the separatist regions of Georgia.\(^{88}\) This provoked an armed conflict that regained no territory and greatly damaged relations with South Ossetia.\(^{89}\) Saakashvili’s subsequent attempt to reach a peace agreement with South Ossetia was soundly rejected by South Ossetians who voted overwhelmingly in favor of independence in a referendum put to them in 2006.\(^{90}\) Another attempt at peace negotiations fell apart in 2007.\(^{91}\)

Tensions increased again sharply in 2008 when shortly after Kosovo’s declaration of independence in February, Russia strengthened its support for de facto authorities in South Ossetia and Abkhazia by withdrawing from sanctions imposed on the two separatist regions by neighboring states and increasing troops in the region.\(^{92}\) In April, a Russian presidential decree established direct official Russian relations with the South Ossetian and Abkhaz authorities.\(^{93}\) Also that month, NATO convened to consider the eligibility of Georgia and Ukraine for

85. Allison, supra note 84, at 1146.
86. Id. at 1147.
87. Id.
88. NICHOL, supra note 11, at 3.
89. See INT’L CRISIS GROUP, supra note 11, at 11-16.
90. NICHOL, supra note 11, at 3. The separatists reported that ninety-five percent of 55,000 registered voters turned out and that ninety-nine percent approved the referendum. The Organization for Security and Cooperation in Europe and the U.S. State Department, however, declined to recognize these votes. In “alternative” voting among ethnic Georgians in South Ossetia, a referendum was approved supporting Georgia’s territorial integrity instead. Id.
91. Id. at 3-4.
93. Allison, supra note 84, at 1147.
Membership Action Plan (MAP) status, the first formal step in joining NATO. Although Georgia did not receive MAP status in April, the United States, its most powerful NATO supporter, "negotiated an outcome document that promised 'that [Georgia and Ukraine would] become members of NATO' at some time in the future." In July 2008, Russia conducted military exercises involving more than 8000 troops near the border with Georgia. At the same time, Russian officers hired Ossetians to help construct local military buildings and sent railway workers into Abkhazia to restore a broken link between Russia and Georgia. On July 8, Russian military planes flew over South Ossetian airspace. Russia claimed it had discouraged Georgia from an imminent attack on South Ossetia, but Georgia denounced the flights as violating its territorial integrity. On July 30, both sides again exchanged artillery fire, following a bombing of Tskhinvali, the capital of South Ossetia, several days earlier. On August 1, a roadside bomb just outside the city injured five Georgian police, which triggered serious fighting over the next three days.

On August 8, in response to South Ossetian militias' continued shelling of Georgian villages, Georgian troops advanced on and shelled Tskhinvali, taking control of most of the city and several Ossetian villages. The Georgian air force also started to bomb the Russian tanks that had begun to cross into Georgia, but the Russians eventually forced the Georgian military to withdraw its troops from South Ossetia on August 11. On August 12, mediation by French President Nicolas Sarkozy, also the president of the European Union, produced a six-point ceasefire agreement that was signed on August 15 and 16.

On August 25, Russian President Dmitry Medvedev declared that "humanitarianism" led him to recognize the independence of the separatist regions. The United States and the international community, however, roundly condemned this recognition. On September 8, President Sarkozy negotiated a follow-on agreement that resulted in the deployment of over 200 EU observers to the conflict.

94. Id. at 1165.
95. INT'L CRISIS GROUP, supra note 92, at 11.
96. NICOL, supra note 11, at 4.
97. INT'L CRISIS GROUP, supra note 92, at 2.
98. NICOL, supra note 11, at 4.
99. Id. at 5.
100. Id.
101. INT'L CRISIS GROUP, supra note 92, at 3.
102. NICOL, supra note 11, at 9.
zone, and even more importantly, in the withdrawal of Russian forces from areas adjacent to the borders of Abkhazia and South Ossetia in October.103

The account above is derived primarily from Jim Nichol's Congressional Research Service Report for Congress on the conflict, as well as the International Crisis Group Europe Report. While it is verified by other sources,104 the New York Times notes, "It is very difficult to parse the competing narratives .... Both sides are now seeking to take the other to the International Criminal Court over allegations of genocide or ethnic cleansing. For the moment, it seems perfectly reasonable to assume that such claims constitute hyperbole and propaganda."105 Both Russian and Georgian officials have accused each other of genocide and ethnic cleansing as a means of justifying their actions in the conflict. Russian Prime Minister Vladimir Putin introduced the term genocide to describe Georgian aggression, claiming that it had resulted in 1500 to 2000 deaths.106 In front of the U.N. General Assembly in September, Georgian President Saakashvili described the actions of Russian and Ossetian militias as ethnic cleansing.107 As of August 10, however, Human Rights Watch documented less than 100 civilian deaths.108

On August 12, Georgia filed a case against Russia, which was heard by the International Court of Justice (ICJ) in September, for alleged acts of ethnic cleansing and other crimes.109 After an investigation, the ICJ issued "provisional measures" on October 15 to both Russia and Georgia to cease and desist ethnic discrimination.110 In the meantime, Human Rights Watch concluded that both countries were at fault; Georgia had used "indiscriminate and disproportionate force resulting in civilian deaths in South Ossetia" during the conflict, and "the Russian military subsequently used 'indiscriminate force' in

103. Id. at 9-10.
104. See, e.g., Allison, supra note 84, at 1147; Nichol, supra note 11, at 4.
106. INT'L CRISIS GROUP, supra note 92, at 2.
108. INT'L CRISIS GROUP, supra note 92, at 2-3. On September 3, the Russian prosecutor general's office reported 134 civilian deaths in South Ossetia, and the death of fifty-nine Russian soldiers. On September 15, the Georgian government reported 372 citizens dead, including 168 military personnel, 188 civilians and sixteen policemen. Nichol, supra note 11, at 15.
110. Id.
South Ossetia" and parts of Georgia and targeted convoys of civilians trying to flee.\(^{111}\)

B. The Unjustified Invocation of R2P

On August 9, 2008, even as Russian forces were crossing over into Georgia, Russian Foreign Minister Sergey Lavrov made the argument that the Russian Federation’s use of military force was an exercise of its responsibility to protect Russian citizens in Georgia. Lavrov stated the following during an interview with the BBC:

My President yesterday was very clear. He said that under the Constitution he is obliged to protect the life and dignity of Russian citizens, especially when they find themselves in the armed conflict. And today he reiterated that the peace enforcement operation enforcing peace on one of the parties which violated its own obligations would continue until we achieve the results. According to our Constitution there is also responsibility to protect—the term which is very widely used in the UN when people see some trouble in Africa or in any remote part of other regions. But this is not Africa to us, this is next door. This is the area, where Russian citizens live. So the Constitution of the Russian Federation, the laws of the Russian Federation make it absolutely unavoidable to us to exercise responsibility to protect.\(^{112}\)

There is little question that Russia’s reliance on R2P is seriously misplaced for a number of reasons. First, Russia did not claim it was acting on behalf of Russian citizens within its borders, but only outside it and therefore also outside the scope of R2P.\(^{113}\) While the R2P doctrine does not explicitly confine its application within the relevant state’s borders, that it does so derives from the conception of R2P as a means of justifying, under limited circumstances, outside incursion onto sovereign soil where the relevant sovereign has failed to protect its people on its own soil. Thus, R2P was designed to correct situations like the genocide in Rwanda and Srebrenica, that is, those that involved the failure of the government to protect its population.

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111. Id. at 16-17. A World Bank report in October stated that 127,000 people had been displaced from their homes during the fighting, and that 68,000 of those people had since returned to their homes. Id. at 15-16. Another 34,000 people were in need of short-term housing, and 30,000 more needed long-term housing because their homes were destroyed. Id.

112. Ministry of Foreign Affairs, supra note 12.

113. See Global Centre for the Responsibility To Protect, The Georgia-Russia Crisis and the Responsibility To Protect: Background Note (2008), http://globalr2p.org/pdf/related/GeorgiaRussia.pdf (noting that that the protection of Russian citizens abroad is beyond the scope of the R2P norm since it does not apply to a country protecting its nationals outside of its own borders).
from the commission of mass atrocities within its borders. Russia improperly turns this on its head by suggesting that R2P applies to the protection of its nationals outside its borders. Indeed, such actions have historically been justified under the conceptually distinct notion of self-defense.\textsuperscript{114}

Additionally, even if R2P could be applied extraterritorially as such, or if Russia argued it was acting because of Georgia’s failure to protect Georgian citizens within Georgia’s borders—the latter a more coherent argument but one that Russia ironically could not make on account of its ambitions effectively to annex South Ossetia—it is not at all clear that Georgia committed mass atrocities in fighting an armed South Ossetian militia, which must be found to justify the invocation of R2P. It is likewise unclear that military intervention by Russia was used as a last resort and that more peacable methods of resolving the dispute were unavailable to Russia. This all further assumes that Russia can act unilaterally under R2P, which is eminently not the case as articulated in the Summit Outcome Document.

Perhaps most troublingly, there is considerable doubt as to Russia’s true intentions. Certainly, as the historical record sketched out above reflects, the long-standing tension between the two countries subsequent to the breakup of the Soviet Union suggests that other equally if not more plausible rationales include intimidating the Georgian military and government, undercutting Georgia’s efforts to join NATO, and consolidating control over South Ossetia and Abkhazia. Indeed, not only is R2P inapplicable to the Russian intervention as such, its invocation in that situation is positively harmful to its development as an emerging norm of international law. R2P represents the culmination of a long journey that has been beset by a number of obstacles, including the tortured history of the concept of humanitarian intervention and the skepticism of developing countries of its use by dominant world powers to serve their hegemonic, if not expansionist, ambitions. This could well come back to haunt R2P if the same potential for abuse here is not swiftly dealt with by a categorical rejection of Russia’s proposed reliance on the doctrine.

\textsuperscript{114} See id.; see also EVANS, supra note 24, at 135 (discussing the invocation of the principle of self-defense under art. 51 with respect to India’s invasion of East Pakistan in 1971 in response to West Pakistan’s suppression of Bengalis).
IV. THE INVOCATION OF R2P IN THE WAKE OF CYCLONE NARGIS IN MYANMAR

The harder, more urgent question for this Article, however, is whether R2P could have been invoked to justify the proposed foreign intervention compelling delivery of aid to Myanmar.

A. The Factual Background

On May 2, 2008, tropical cyclone Nargis made landfall in Myanmar, also called Burma, and left a trail of destruction in its wake.\textsuperscript{115} The cyclone wreaked the greatest harm in Southern Myanmar, particularly in a region known as the Irrawaddy River delta.\textsuperscript{116} In the worst-affected areas, ninety-five percent of people lost their homes and possessions.\textsuperscript{117} While estimates vary, there is no denying the severe human and economic toll of the storm. The Myanmar government claims there are approximately 78,000 dead and 56,000 missing, whereas outside observers believe the figure to be closer to 100,000.\textsuperscript{118} Additionally, the cyclone is said to have caused some $10 billion of damage.\textsuperscript{119}

Almost from the outset, the Myanmar government began intercepting efforts to reach survivors.\textsuperscript{120} Only days after the storm passed, for example, military leaders in Myanmar seized a shipment of food from the United Nations and refused to allow its distribution by foreign aid workers.\textsuperscript{121} On one occasion a plane with aid was turned away because it also carried foreign aid workers and press.\textsuperscript{122} Separately, a spokesperson for the World Food Program (WFP) stated that all the food aid and equipment that it had managed to transport to Myanmar had been confiscated.\textsuperscript{123} He noted further that the delay and frustration the WFP experienced in Myanmar was “unprecedented in

\begin{itemize}
  \item \textsuperscript{116} \textit{U.N. Chief Announces Accord with Myanmar on Cyclone Aid}, L.A. TIMES, May 24, 2008, at A3.
  \item \textsuperscript{117} Seth Mydans et al., \textit{Myanmar Seizes U.N. Food for Cyclone Victims and Blocks Foreign Experts}, N.Y. TIMES, May 10, 2008, at A10.
  \item \textsuperscript{118} Johnson, \textit{supra} note 1, at World 1; \textit{U.N. Chief Announces Accord with Myanmar on Cyclone Aid}, \textit{supra} note 116.
  \item \textsuperscript{119} \textit{U.N. Chief Announces Accord with Myanmar on Cyclone Aid}, \textit{supra} note 116.
  \item \textsuperscript{120} See generally Mydans et al., \textit{supra} note 117 (noting government initially blocked nearly all aid workers from entering).
  \item \textsuperscript{121} \textit{Id}.
  \item \textsuperscript{122} \textit{Id}.
  \item \textsuperscript{123} \textit{Id}.
\end{itemize}
modern humanitarian relief efforts. By one estimate, the lack of aid had left 2.5 million survivors vulnerable to hunger, exposure, and disease.

Myanmar's inability or unwillingness adequately to help the survivors has been traced to various causes. Most immediately, the regime insisted on proceeding with a constitutional referendum that had previously been scheduled on May 10, 2008, although the voting ended up being postponed until May 24, 2008, in Yangon and the areas hardest hit by the cyclone. The purpose of the referendum was the official shifting of power to the military. Critics of the government assert that the logistical support required for a national election detracted from the resources available to aid victims.

Another explanation offered is that the areas hit hardest by the cyclone are occupied by ethnic minorities perceived as hostile by the military regime. These minorities occupy a part of the country rich in natural resources, and tension has long existed between them and the government, which for nearly thirty years has been trying systematically to relocate these tribal peoples to make way for access to the resources. It has been alleged that delaying aid to the ethnic victims serves as a back-door method for the forcible relocation en masse of those minorities. This theory, however, is difficult to corroborate independently.

Also, it may not have helped matters that China allegedly declined to use its influence to pressure Myanmar into accepting aid. As Myanmar's largest trading partner and military supplier, China has obvious and significant influence over the Myanmar regime. Yet, while China itself has managed to deliver aid into Myanmar, it has reportedly opposed efforts to bring the issue before the U.N. Security Council. It has also refused to pressure Myanmar to allow in aid.

124. Id.
127. Mydans et al., supra note 117.
128. Id.
129. Tim Heinemann, Op-Ed., A Sinister Sweep: Myanmar Uses Cyclone To Push Out Ethnic Minorities, CHI. TRIB., May 30, 2008, at C25; see also Johnson, supra note 1, at World 1 (pointing out that many affected were members of an ethnic minority).
130. Heinemann, supra note 129.
131. Id.
from Western countries. Some analysts have speculated that China has been careful not to alienate Myanmar with an eye to the extensive business dealings between the two countries. Additionally, the massive earthquake that devastated the Sichuan province of China on May 12, 2008 had preoccupied the government and diverted its attention from Myanmar.

There have since been some encouraging developments in the situation. Most notably, prior to a summit of fifty donor nations, U.N. Secretary-General Ban Ki Moon traveled to Myanmar on May 23 and 24, and extracted concessions from the regime to allow foreign aid workers into Myanmar, although only a week later, U.S. Navy ships and aircraft carrying supplies were forced to abandon attempts to deliver the aid due to the repeated refusals of the Myanmar regime. Aid did, however, reach the victims soon thereafter, and by July 24, the U.N. Under-Secretary-General for Humanitarian Affairs was able to conclude that humanitarian organizations had reached virtually all cyclone-affected individuals with some relief assistance, although it stressed the challenge of systematically providing ongoing support, particularly to populations in remote areas.

In surveying the situation, U.S. Defense Secretary Robert Gates has refrained from calling it genocide, but did pointedly refer to the Myanmar government's refusal of aid as "criminal neglect."

B. The Invocation of R2P

Just days after the cyclone passed, and after Myanmar made it clear it was not about to let aid into the country, the French Foreign Minister Bernard Kouchner stated that "[w]e are seeing at the United Nations if we can't implement the 'responsibility to protect,' given that food, boats and relief teams are there, and obtain a U.N. resolution which authorizes the delivery (of aid) and imposes this on the Burmese.

135. Johnson, supra note 1, at World 1.
136. See Montlake, supra note 132 (discussing China's priorities shifting to earthquake in Sichuan).
137. U.N. Chief Announces Accord with Myanmar on Cyclone Aid, supra note 116.
140. Schmitt, supra note 138.
Consistent with this suggestion, the French U.N. Ambassador Jean-Maurice Ripert asked the Security Council to call for a humanitarian briefing and issue a statement urging greater cooperation. The request, however, was not acted upon after China, Vietnam, South Africa and Russia had argued during closed consultations against the Security Council getting involved.142

Not surprisingly, Myanmar has trenchantly opposed any such application of R2P. Chargé d’Affaires Muang Muang, Myanmar’s top diplomat in Canada, described the French effort as a blatant politicization of a grave humanitarian crisis, and warned that it would set a “dangerous precedent.”143 He further disputed the applicability of R2P in this situation, noting that the doctrine “was aimed to prevent genocide, not for use in times of natural disasters.”144

The invocation of R2P in the wake of the cyclone precipitated a fierce debate on the question of the doctrine’s application in Myanmar, and more generally, on its application to natural disasters. Critics who oppose relying on R2P in these circumstances point out that unlike the original formulation espoused by ICISS, the doctrine as articulated in the Summit Outcome Document applies only to mass atrocity crimes and does not explicitly encompass natural disasters.145 They regard the omission as a deliberate rejection by the United Nations of the applicability of R2P to natural disasters, asserting that its use here is accordingly improper and further will only encourage reliance on the doctrine to justify all manner of humanitarian interventions.146 In their view, the result would be to destroy the legitimacy of R2P, foreclosing its use in future crises that genuinely call for it.147

In contrast, supporters of the use of R2P in the Myanmar crisis argue that parsing through such legal niceties in a situation where lives are at stake does not make moral sense, and that refraining from employing R2P simply because natural disasters are involved will in fact neuter the doctrine and turn it into a meaningless catchphrase.148

141. See Parsons, supra note 2.
142. See id.
143. See Davis, supra note 133.
144. Id.
145. See discussion infra Part VA.1.
146. See discussion infra Part VA.1.
147. See discussion infra Part VA.1, B; see also Thakur, supra note 8 ("[A]ny effort to invoke R2P formally in the Security Council [without the assent of Myanmar’s Asian neighbors] would have the counter-productive effect of damaging R2P permanently . . . .").
148. See, e.g., Axworthy & Rock, supra note 9 ("What is the moral distinction between closing the door of rescuing people from death by machete and closing the door of life-saving aid?").
While both sides make compelling arguments, the very premise of the exchange is fundamentally unsound, based as it is on the concept of natural disasters. To the extent that R2P applies, it does so because of the state’s criminal failure to protect its citizens from harm in the wake of the natural disaster and not because of the deaths immediately caused by the natural disaster. Put differently, if Myanmar could reasonably, but did not, prevent the continuing large-scale loss of life following the cyclone, for example, by promptly allowing foreign aid into the country, then R2P is potentially applicable since such deliberate inaction is the cause of the harm at issue; plainly, no one is proposing to hold Myanmar accountable under R2P for any immediate harm caused by the cyclone or harm that could not otherwise have been reasonably averted.

V. THE CONSTRUCTIVE INTERPRETATION OF THE RESPONSIBILITY TO PROTECT

Properly reframed, the debate implicates concerns that go beyond those attending natural disasters specifically. Consistent with this realignment, this Article advocates what I call the “constructive interpretation” of R2P. Under this interpretation, R2P applies not just to a government’s failure to protect its people from affirmatively perpetrated mass atrocities but also from harm based on omission where the government’s failure to act also constitutes a crime against humanity under international law.

Reframed as such, the arguments raised on both sides of the table, whether legal or political, can now be answered within a cohesive and coherent framework based on the constructive interpretation of R2P. As set out below, this Part will analyze these various arguments and advance both a legal and political case for supporting that interpretation.

A. A Legal Case for the Constructive Interpretation of R2P

1. The Scope of R2P as Defined and the Red Herring of “Natural Disaster”

As set out in the Summit Outcome Document, R2P applies on its terms only to a state’s failure to protect its populace from mass atrocity crimes, i.e., “genocide, war crimes, ethnic cleansing, and crimes against humanity.”[^149] Indeed, the United Nations’ formulation is

[^149]: Summit Outcome Document, supra note 4, ¶ 139.
distinctly narrower than the original expression of the doctrine as formulated by the ICISS, which explicitly applies additionally to “overwhelming natural or environmental catastrophes, where the state concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened.”

As a result, some commentators believe that R2P is inapplicable here. The argument is that the narrowing of the scope of R2P for the Summit Outcome Document should be acknowledged as a conscious act to create consensus among skeptics of the original ICISS Report and thus to exclude natural disaster situations. China has explicitly made the point that the Myanmar crisis should not come before the U.N. Security Council as an R2P issue given that it involved a natural disaster. ICISS member Ramesh Thakur, in his analysis of the applicability of R2P to Myanmar, concluded that the exclusion of the reference to natural disasters from the Summit Outcome Document clearly suggests that the doctrine was intended to be limited to the affirmative commission of atrocities and armed combat. He believed that its back-door introduction here would undermine the fragile support for the doctrine “and damage R2P for other times when we will need it.” Similarly, the U.N. Secretary-General's 2009 report on R2P asserted—without explanation or supporting argument—that “[t]o try to extend [R2P] to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility.”

However, as pointed out earlier, the entire discussion has been sidetracked by the unfortunate and misleading focus on the term “natural disasters.” As a result, the arguments raised above fail sufficiently to recognize that R2P is implicated only to the extent the state could reasonably, but did not, halt the large-scale suffering of its people in the aftermath of the natural disaster. In that situation, the

150. ICISS REPORT, supra note 5, para. 4.20; see also Davis, supra note 133.
151. See Thakur, supra note 8 (stating the exclusion of natural disasters should not be taken lightly); Nanda, supra note 18, at 372 (noting that the Summit Outcome Document reflects some states’ resistance to give a blank check to the U.N. Security Council).
152. See Leow, supra note 134 (noting the Chinese government's statement that natural disasters should be handled bilaterally rather than through the U.N. Security Council).
153. Thakur, supra note 8 (arguing that the placement of the phrase “crimes against humanity” after descriptions of war atrocities in the final U.N. formulation of R2P suggests that the phrase should be read in the context of armed combat and affirmative actions by governments).
154. Davis, supra note 133 (quoting Thakur on same).
state is also directly accountable for its intentional omission, and it is the state's deliberate failure to act—*and not the natural disaster*—that is deemed the cause of the harm. When that failure to act may properly be described as a crime against humanity, R2P applies squarely to the situation. Thus, the question as to the applicability of R2P to the Myanmar situation turns on whether Myanmar's failure to help its population in the aftermath of the cyclone is a crime against humanity.

In examining this question, it is important to keep in mind that there are two distinct requirements that must be met in order for R2P to be invoked: (1) the relevant state must be failing to protect its populace and (2) as against one of the four specified mass atrocity crimes.

As to the first requirement (failure to protect), the actor—or more descriptively, "nonactor"—has to be the state, whereas as to the second requirement (commission of underlying mass atrocity crime), the actor may be the state itself or a third party. Plainly, in the situation where the state is the perpetrator of an underlying mass atrocity crime against its own populace, thereby meeting the second requirement, the first requirement is necessarily met as well. As such, if Myanmar has committed a crime against humanity with respect to its people, then it would necessarily have failed to protect its people against that mass atrocity, and R2P would come into play.

That a state as opposed to individuals may commit an act described as "a crime under international law"—meaning that the act is attributable to the state—has been affirmed by the ICJ in the case of *Bosnia v. Serbia*. The Court held there that the state parties, in assuming an obligation under the Convention on the Prevention and Punishment of the Crime of Genocide to prevent genocide—which the Convention categorizes as "a crime under international law"—were necessarily "prohibit[ed] . . . from themselves committing genocide." Such was the case even though the Convention "does not expressis

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156. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Judgment, 2007 I.C.J. 91, ¶ 166 (Feb. 26), available at http://www.icj-cij.org/docket/files/91/13685.pdf [hereinafter *Bosnia v. Serbia*]; see also id. ¶ 173 (noting with regard to the responsibility of states and individuals for internationally wrongful acts that "duality of responsibility continues to be a constant feature of international law"). Note that in determining that a state may commit genocide under the Convention, the ICJ was not also saying that the state would attract criminal responsibility as a result. Indeed, it sidestepped the latter issue, and simply noted that the consequence of a state committing genocide under the Convention was a breach of the state's responsibilities under international law. See id. ¶¶ 166-167, 170.

157. *Id.*
verbis require States to refrain from themselves committing genocide" and even though concepts in the Convention, including those referring to complicity, "refer to well known categories of criminal law and, as such, appear particularly well adapted to the exercise of penal sanctions against individuals."  

This was because it would otherwise subvert the object of the Convention and further be  

paradoxical if States were thus under an obligation to prevent, so far within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law.

Likewise, having the responsibility to protect against mass atrocity crimes necessarily means that states are (capable of and) prohibited from themselves committing acts amounting to mass atrocity crimes, even though R2P is not phrased in those terms in the Summit Outcome Document and even if the mass atrocity crimes "appear particularly well adapted to the exercise of penal sanctions against individuals."

2. Crimes Against Humanity by Omission

As noted above, the Summit Outcome Document defines R2P as applicable inter alia to "crimes against humanity." The concept of "crimes against humanity" is part of customary international law and has been codified in article 7(1) of the Rome Statute of the International Criminal Court (Rome Statute) as follows:

For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack;

(a) Murder;

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159. *Id.* ¶ 166.

160. This is not to say that challenging problems may not arise concerning the application of concepts of criminal law ordinarily employed for individuals in determining the international responsibility of states that have apparently perpetrated such mass atrocities. For example, it may be difficult to determine whether particular conduct of a state official is attributable to the state for purposes of determining state responsibility. Such issues may well be fodder for another article. I am more concerned in this Article, however, with laying out more generally the proper framework for analyzing the R2P doctrine.

As reflected in article 7(1), the elements of “crimes against humanity” can be divided into two categories: (1) general or chapeau elements as listed in the introductory language in article 7(1) relating to “attack” and that are applicable to the various “acts,” each of which may be the basis of a crime against humanity, and (2) mental (mens rea) and physical (actus reus) elements of the relevant “act.”

a. The Chapeau Elements

The chapeau elements are general requirements common to all the listed offenses and provide the context in which the offense must take place in order to qualify as a crime against humanity. In essence, there must be (1) an attack that is (2) widespread or systematic, (3) directed against a civilian population, and (4) knowledge on the part of the perpetrator of the attack.

As defined in article 7(2)(a) of the Rome Statute, an “‘[a]ttack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.” Note, however, that the concept of “attack” is not the same as that employed in the law of war crimes and does not have to involve armed conflict or the use of

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163. Rome Statute of the International Criminal Court, supra note 162, art. 7(1).

164. Id. art. 7(2)(a).
armed force. Rather, an attack encompasses any mistreatment of the civilian population and can consist of nonviolent acts, such as instituting apartheid or applying pressure on the population to act in a particular way.

Additionally, while the policy to commit such attack has been read to require the state or organization actively to promote or encourage such an attack, various International Criminal Tribunal for the Former Yugoslavia (ICTY) cases have, in fact, rejected the idea that there even is a policy requirement for crimes against humanity. In any event, where required, such a policy may exceptionally be implemented by a deliberate failure to take action that consciously seeks to encourage such attacks or the result.

Taken together, Myanmar’s actions, or the lack thereof, could potentially meet all the chapeau requirements: Myanmar’s failure to help its citizens and refusal to allow for the delivery of aid could be characterized as mistreatment of the population, and therefore an “attack” under article 7(1) since it is widespread and systematic in that it affects a broad swath of the population, against which it is directed, and Myanmar is clearly aware of its (in)action.

b. The Mental and Physical Elements of Underlying “Acts”

In addition to the chapeau requirements, crimes against humanity are defined additionally to include the mental and physical elements of the relevant “act.” Two of the acts listed in article 7(1) are potentially relevant to the Myanmar situation: murder and “other inhumane acts.”

While murder is a familiar concept, the latter is less so, and a brief introduction to what constitutes “inhumane acts” is in order here. “Crimes against humanity” has long been the subject of various

166. Prosecutor v. Kunarac, Case No. IT-96-23 and IT-96-23/1-T, Appeal Judgement, para. 86 (June 12, 2002).
167. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgement, para. 582 (Sept. 2, 1998); Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Trial Judgement, para. 70 (Dec. 6, 1999); Prosecutor v. Musema, Case No. ICTR-96-13-T, Trial Judgement, para. 205 (Jan. 27, 2000).
168. See ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 197–98 (2007).
169. See ICC, supra note 165, at 116 n.6.
170. Rome Statute of the International Criminal Court, supra note 162, art. 7(1)(a), (k).
instruments of international criminal law. Critically, many of these instruments define crimes against humanity similarly to include a residual category of "inhumane acts." An early example is the Charter of the International Military Tribunal at Nuremberg, which defined crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population." Since Nuremberg, a number of other statutes governing international criminal courts have likewise cataloged crimes against humanity, including the statutes of the ICTY and International Criminal Tribunal for Rwanda (ICTR), which list imprisonment, torture, and rape among "other inhumane acts." Most recently, the agreement between the United Nations and the Cambodian government establishing the Khmer Rouge war crimes tribunal has followed suit by essentially adopting the definition of "crimes against humanity" in the Rome Statute.

The rationale for including this catch-all provision is to ensure that instances of inhuman behavior that do not neatly fall under other existing categories of crimes against humanity will not escape criminalization, nor their perpetrators accountability. This, however, does not mean a blank check for prosecutors, since the provision is subject to strict conditions concerning the gravity of the inhuman conduct. In accordance with ICTY and ICTR jurisprudence, "other inhumane acts" include only those crimes that are not otherwise specified but are of comparable gravity.

i. Mental Elements of the Underlying "Acts"

Murder in this context has been defined as an intentional killing of a human being resulting from an unlawful act or omission of the perpetrator. While the mental element, as a rule, is the intent to kill the victim, "a lesser mental element is required by case law: it is

171. Charter of the International Military Tribunal, supra note 162, art. 6(c).
172. Statute of the International Criminal Tribunal for the Former Yugoslavia, supra note 162, art. 5; Statute of the International Criminal Tribunal for Rwanda, supra note 162, art. 3.
174. See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 114 (2d ed. 2008).
176. Akayesu, Case No. ICTR-96-4-T, para. 589; see also ICC Elements of the Crimes, supra note 165, art. 7(1)(a).
sufficient for the perpetrator 'to cause the victim serious injury with reckless disregard for human life.'

The mental element of "other inhumane acts" is likewise one of intentionality, except that it consists of the intention to inflict serious physical or mental suffering or to commit a serious attack upon the human dignity of the victim, or where the perpetrator knew that its act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity.

It is arguable that the Myanmar situation meets the mental element of murder described above. In choosing not to help its population by barring aid, Myanmar caused serious injury to its citizens in reckless disregard of human life. The mental element of "other inhumane acts" is also met under the circumstances for the same reasons, it being clear that any failure to help its people would cause severe physical and mental suffering.

ii. Physical Elements of the Underlying "Acts"

Importantly, for our purposes, the physical element (actus reus) of both murder and "other inhumane acts" has been expressly defined by various international courts to include both acts and omissions. Murder, for example, has been defined as an intentional killing of a human being that "resulted from an unlawful act or omission" of the perpetrator. Similarly, the crime of inhumane acts has been defined to consist of "an act or omission of similar seriousness to the other acts enumerated . . . [that] caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and . . . was performed intentionally by the accused."

Furthermore, there is ICTR jurisprudence that has explicitly recognized an omission to be the basis of a finding of a "crime against humanity" (with the underlying "act" being one of "extermination") under the ICTR statute. The case of Prosecutor v. Vincent Rutaganira involved a defendant, Vincent Rutaganira, who had served as conseiller of the Mubuga sector, Gishyita Commune, Kibuye

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177. CASSESE, supra note 174, at 109 (citations omitted); see also Prosecutor v. Kupreškić, Case No. IT-95-16-T, Trial Judgement, para. 560 (Jan. 14, 2000); Akayesu, Case No. ICTR-96-4-T, para. 589.


179. Akayesu, Case No. ICTR-96-4-T, para. 589 (emphasis added); see also ICC, supra note 165, at art. 7(1)(a).

180. Galić, Case No. IT-98-29-T, para. 152 (emphasis added) (footnote omitted).
Prefecture in Rwanda from 1985 to 1994. The various charges brought against Rutaganira centered on a massacre in April 1994 of thousands of Tutsi who had sought refuge in a church in Mubuga. Prior to the attacks, Rutaganira witnessed the attackers assembling, but despite his position, had failed to take any action to protect the Tutsi. Pursuant to a plea agreement, however, Rutaganira pled to and was found guilty of only one count: "crime against humanity (extermination) . . . for having aided and abetted the commission of the said crime by omission."

Significantly, in his plea agreement, Rutaganira admitted only to omissions; that is, he denied both ordering the attack on the church and participating in the attack, the charges that had formed the basis for his original indictment. Rather, he admitted only that he was aware that Tutsi civilians had gathered in the church, that he was aware that assailants were gathering near the church before the attack took place, and that ‘despite the fact that he was conseiller of Mubuga secteur he failed to protect the Tutsi who had sought refuge’ in the church.”

In finding that Rutaganira participated in a crime against humanity by omission, the trial chamber considered whether the defendant had the requisite actus reus and mens rea. In the context of an omission, the actus reus was determined by making three inquiries:

(i) Did the Accused have the power to act and chose not to exercise it?
(ii) Did the Accused have authority over the principal actors to prevent them from committing the crime and chose not to use it?
(iii) Did the Accused have the legal duty to act and failed to so act?

On the first two questions, the chamber determined that Rutaganira had influence as conseiller and further “wielded moral authority” over the principal actors, which he had failed to exercise to prevent the

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181. "Rwanda is divided into eleven prefectures, and each of these prefectures is further divided into communes, which are themselves divided into sectors." Nancy Amoury Combs, Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts, 59 VAND. L. REV. 69, 111 n.207 (2006).
183. Id. para. 21.
184. Id. para. 22.
185. Id. para. 36, verdict (emphasis added).
186. Combs, supra note 181, at 111-12.
187. Rutaganira, Case No. ICTR-95-1C-T, Summary para. 27.
188. Id. para. 28.
attacks.\textsuperscript{189} As to the third question, the chamber found that "under international law, Vincent Rutaganira had a duty to act, as a State employee, to protect the population of his secteur."\textsuperscript{190} Accordingly, the chamber concluded that Rutaganira had the requisite \textit{actus reus} and had "participated by omission" during the massacre at Mubuga church. The chamber also determined that he had the requisite \textit{mens rea} in that he knew of the attacks and further knew that his inaction contributed to the harm.\textsuperscript{191}

By extension, whether a state has the requisite \textit{actus reus} to support a finding of a crime against humanity by omission can be determined by the following three questions:

(i) Did the state have the power to act and choose not to exercise that power?
(ii) Did the state have the ability to prevent the harm and choose not to use it?
(iii) Did the State have the legal duty to act and fail so to act?

Accordingly, assuming the relevant \textit{mens rea} is met, where a state has the power to act and chooses not to exercise that power to protect its population from "great suffering, or serious injury to body or to mental or physical health," it would be committing "a crime against humanity . . . by omission" if the action would have prevented the harm since a state evidently has the legal duty under international law to protect its population from such harm.\textsuperscript{192} As such, in the event that the \textit{chapeau} elements are also met, R2P is applicable when a state fails to protect its people from grave harm by omission where the failure to act constitutes a crime against humanity, including, potentially, where the omission involves natural disasters like cyclone Nargis.

One may argue that the situations are nonetheless distinguishable when one considers the actual instrument of harm. In \textit{Rutaganira}, the victims were harmed by physical attacks constituting affirmative criminal acts, whereas the victims in \textit{Myanmar} were harmed by the failure to provide food and water, properly characterized again as omissions. Such an argument, however, proves too much. It confounds reason to reject such a distinction with respect to the defendant/state only to resurrect it again with regard to the secondary

\textsuperscript{189} \textit{Id.} para. 30.
\textsuperscript{190} \textit{Id.} para. 31. The tribunal additionally found that Rutaganira was required to render assistance to persons in danger, pursuant to Section 256 of the Rwandan penal code. \textit{See} \textit{id.}
\textsuperscript{191} \textit{Id.} para. 28.
\textsuperscript{192} \textit{Id.} para. 36; ICC, \textit{supra} note 165, art. 7(1)(k).
question of the mechanics of harm. The proper focus in determining the existence of a crime against humanity, as Rutaganira reflects, should be on whether the defendant/state and not any third party actors had the requisite actus reus, which encompasses omissions, and mens rea, which includes the knowledge that harm would result from deliberate inaction.193

Indeed, if anything, the reverse is true: a situation involving an omission-based instrument of harm may well be easier and safer to neutralize, thereby making it less—not more—justifiable for the state to have failed to correct its omission, as opposed to dealing with the commission of violence by third parties. For instance, it would have been comparatively less risky for Myanmar to allow in the foreign aid than it would have been for Rutaganira to confront the attackers, or for a state government to head off attacks by a rogue militia on its civilian population, to draw a more equivalent example. Yet, while few would dispute that the government of Sudan has manifestly failed to protect its people in Darfur from crimes against humanity, even if one were to assume that the Janjaweed was independently and exclusively responsible for the violence, the same is not true with respect to the Myanmar government.

Moreover, it makes little logical or moral sense to maintain the distinction, particularly under these circumstances, when the end result is the same: “great suffering, or serious injury to body or to mental or physical health.”194 Simply put, a hundred lives lost, whether to cyclones or ethnic cleansing, is a hundred lives lost.

c. The Slippery Slope Argument

Separately, detractors of R2P may charge that expanding the scope of R2P to include a situation like that in Myanmar is an exercise on a slippery slope that will potentially sweep all manner of threats to human security, including environmental disasters and pandemic threats within the scope of R2P.195 Such an argument, however, fails to

193. This situation should not be confused with the distinct question of determining the applicability of R2P in a situation where the underlying mass atrocity crime is committed by a third party rather than the state; in the latter situation, the inquiry does turn on and therefore focuses on the mens rea of the third party committing the crime. See supra Part VA.1.

194. See supra note 162 and accompanying text.

take into account the inherent safeguards in the definition of R2P. First, as discussed above, the constructive interpretation advocated here extends only to those situations involving the intentional failure to act to prevent grievous harm to a population. Under the circumstances described above, it is only when a state can but fails to protect its people, and where such deliberate and inhumane inaction is the cause of the harm, that R2P may properly be invoked.

A second safeguard exists in the definition of the types of harm that trigger R2P, which are “genocide, war crimes, ethnic cleansing, and crimes against humanity.” As the definition and its provenance reflect, R2P is concerned both with the scale of the harm and the fact that the harm be the result of atrocities, hence the general shorthand “mass atrocities” for the list of crimes above. Plainly, isolated incidents of human rights abuses or individual casualties claimed by environmental hazards, for example, cannot be the basis for invoking R2P. There needs to be a confluence of both elements before R2P can be relied upon. There is, however, no explicit reference to these elements in the doctrine as such, much less guidance on how we might determine whether both are present in an R2P context. This Article proposes in response that one way to make such a determination that would accommodate concerns about a constructive interpretation of R2P would be to treat the elements as factors on a sliding scale: The greater the scale of suffering, the less we would require in terms of the “perfect” crime, and vice versa. Pursuant to such a test, R2P would not be invoked in a situation involving omission-based harm unless the scale of the harm is significant. Even under this test, the Myanmar situation would readily qualify for R2P protection. Regardless of how one makes that determination, the need for both elements to be present for the operation of R2P serves as yet another moderating control on the scope of its application.

Further, quite apart from the strictures placed on the scope of R2P by its definition, the doctrine is also reined in by its mode of operation. As articulated in the Summit Outcome Document, a response under R2P must be coordinated by the U.N. or if the response

cfm?id=5190&i=1 (discussing the “misunderstanding” that R2P applies “linguistically” and therefore legally to any global crisis).
196. See supra Part III.A-B.
197. See supra Part III.A-B.
198. See supra Part II.C.
199. See, e.g., EVANS, supra note 24, at 11 (employing the expressions “mass atrocities” to refer to “genocide, war crimes, ethnic cleansing, and crimes against humanity”).
involves the use of force, by the Security Council; R2P does not authorize unilateral action. As such, the doctrine effectively requires international consensus on the question of whether R2P applies to any particular case. Any attempt to invoke R2P in a situation that departs from what the international community understands to fall within its scope within the bounds of customary international law will face a considerable uphill battle.

It should be borne in mind again that the full range of responses short of the use of force is available—and indeed must be considered—to meet an R2P situation. For this reason, fears that the doctrine would be employed in contexts that do not involve armed violence as a pretext for the indiscriminate use of force are misplaced because many such situations will often not permit the use of force on an informed application of R2P. Take, for instance, the potential application of R2P to HIV/AIDS or climate change, which is cited as a self-evident illustration of the slippery slope problem. Because both these situations are comparatively slow-moving (and in the case with HIV/AIDS, potentially complicated by thorny questions concerning individual volition), it is difficult to see how R2P would justify the external use of force in the ordinary situation. Rather, the more likely candidates in terms of an appropriate response could be reliance on diplomatic efforts or trade and other economic incentives or sanctions. These alternative responses may well be available outside R2P, in which case, there would be little reason to look to R2P, which is a very different proposition than asserting that R2P has no application to issues like HIV/AIDS and climate change. The question of whether R2P applies and what response it justifies must be answered by considering systematically whether there exists a mass atrocity crime under the circumstances, and if so, whether the state has failed to protect against it. That is, as the above discussion would suggest, R2P could well apply in a situation involving HIV/AIDS or climate change or other situations not involving armed violence, where the doctrine’s various elements are met, but the use of force will only exceptionally be a justified response.

200. See supra Part II.C.
201. Cf. Evans, supra note 24, at 55 (noting the “extreme” view of those who see R2P “as a way of referring to most of the world’s ills, from climate change to HIV/AIDS”); S-G Report on R2P, supra note 3, para. 10(b) (“To try to extend [R2P] to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility.”).
Further, because these various safeguards are built into R2P, they will operate in any informed application of the doctrine at all points on the proverbial slippery slope, and not just to issues that appear to be on the far end of the incline, like HIV/AIDS and climate change. Consider a different example closer to home both figuratively and literally, namely Hurricane Katrina. One of the largest natural disasters in the history of this country, Hurricane Katrina claimed over 1300 lives and inflicted at least $80 billion worth of damage. It is well documented that the failure of government at all levels—local, state and federal—to anticipate and respond effectively to the disaster exacerbated matters on the ground, resulting in “preventable deaths, great suffering, and further delays in relief.”

There are thus obvious if grim parallels between Hurricane Katrina and Cyclone Nargis. However, a finding that Myanmar’s inaction would justify foreign military intervention does not necessarily warrant the same in the United States in the aftermath of Hurricane Katrina. Unlike Myanmar, the United States—surprised as it was to find itself in the position was reportedly accepting aid quickly and, with a few exceptions, from all corners of the globe. Such aid apparently included the


206. Farah Stockman, U.S. Accepts Nearly $1B in Foreign Aid, BOSTON GLOBE, Sept. 8, 2005, available at http://www.boston.com/news/weather/articles/2005/09/08/us_accepts_nearly_1b_in_foreign_aid (reporting that the “State Department has announced that it has accepted nearly a billion dollars in pledges of foreign aid following Hurricane Katrina” and that the “US government immediately accepted all cash donations”); A Foreign Aid Twist: U.S. Gets, Others Give, USATODAY.com, Sept. 6, 2005, http://www.usatoday.com/news/opinion/editorials/2005-09-06-US-aid_x.htm (noting Harry Thomas, the State Department official in charge of coordinating foreign offers, had reported that Katrina had triggered offers of aid from 95 nations, but that only one offer, of 20 million barrels of oil from Iran, had been
deployment of foreign military vehicles and personnel in U.S.
territory. As such, the United State's receptivity towards assistance
would neutralize the need for the use of force, which is available under
R2P only as a last resort. Again, it is not that R2P could not apply to
the Hurricane Katrina situation—it may do so—but rather that the
proper application of the doctrine will not authorize foreign military
intervention under these circumstances.

In sum, the slippery slope problem as conceived by the critics of
R2P is unlikely to present itself in practice and cannot begin to bear the
weight that they would place thereon in opposing the constructive
interpretation of the doctrine.

B. A Political Case for the Constructive Interpretation of R2P

Even otherwise ardent proponents of R2P have concluded that
R2P is not potentially applicable in the Myanmar crisis, and thus have
impliedly rejected the constructive interpretation of the doctrine. One argument often advanced is that to do so risks resurrecting the
global North-South split over the troubled concept of “humanitarian
intervention” that R2P had assiduously avoided, and that expanding
the doctrine as such could have the perverse effect of weakening
support for tackling the Rwanda crisis of tomorrow.

However, it bears emphasizing that the constructive interpretation
of R2P is based on and operates within the doctrine as defined in the
Summit Outcome Document. Because the constructive interpretation
of R2P is also grounded in prevailing international criminal jurisdic-
tion, there is no need to recognize natural disaster situations or any particular context involving harm by omission as a new and
independent basis for invoking R2P. Rather, any situation involving

207. See Slavin, supra note 205 (noting that a Mexican army convoy and a navy ship
were bound for Texas carrying food, blankets, doctors and nurses, that Canada had sent
planes, helicopters and ships, and 40 divers to Florida where they had begun to check levees
and dikes in southern Louisiana, and that two French planes carrying tents, tarps, food and
emergency personnel had landed in Little Rock and another was due in Alabama).

208. See, e.g., Thakur, supra note 8.

209. Davis, supra note 133 (quoting Thakur, supra note 8).
harm by omission, including natural disaster situations, that warrants intervention already falls within a self-defined basis for the invocation of R2P, namely the failure of a government to protect its population against a crime against humanity. The fact that the constructive interpretation stays faithful to its definition should modulate any concerns about the potential abuse of the doctrine.

Another related argument offered to justify limiting the use of R2P is that the tenuous nature of the hard-earned consensus behind R2P suggests it should be relied upon sparingly and only for the most extreme situations. In other words, we should not squander precious political capital, but save R2P for the truly monumental crises on pain of its evisceration.

Such a rationale is less than convincing, however, given the unfavorable outcome thus far of the United Nations' intervention in Darfur, as discussed above. The result—or more accurately, the lack thereof—is particularly telling since the Darfur crisis is widely regarded as the classic test case for R2P. That such a dire situation, one that not only fits the bill but in which the Security Council has repeatedly invoked R2P, should fail to bring about a justified and justifiable military response casts substantial doubt on whether the approach of limiting R2P to those situations that call clearly for it would, in fact, consolidate and strengthen the doctrine. Instead, such a seemingly stark and all-or-nothing approach makes its use appear prohibitive and discourages actual reliance on the doctrine.

Apologists for the current and limited application of R2P in Darfur may argue that its implementation there was a complex exercise in reaction that not only utilizes the entire machinery of R2P (and not just its military applications), but is also consistent with the principle that all nonmilitary options be considered before resorting to the use of force. Yet, some 200,000 civilians had already been killed when the U.N. Security Council invoked R2P for the first time in the Darfur crisis on May 16, 2006, in passing Resolution 1679. The sheer scale of the ongoing violence should have left little doubt that anything short of a military intervention would not halt the carnage. Sure enough,

210. See discussion supra Part II.D.
211. See discussion supra Part II.D.
213. Gareth Evans, who was co-chair of ICISS, believed the global response to the crisis in Darfur to be inadequate, noting that members of the U.N. Security Council are “all
some three years, four U.N. Security Council resolutions invoking R2P, and an additional 100,000 lives later, a definitive resolution continues to appear elusive.

In contrast, a better approach to adopt for the purposes of building confidence in and ultimately consolidating R2P may be an incrementalist one that allows for a less extreme yet visible and effective application of R2P. Interpreting R2P constructively so as to extend its reach to situations involving an omission-based intentional failure to act could lend itself to that approach. To the extent such situations call for less than a full military response—and it is conceivable that many such situations will do so by virtue of the nature of omissions—the international community may more readily rally around the particular application of R2P.

For example, shortly after Cyclone Nargis passed, the director of the U.S. Office of Foreign Disaster Assistance asserted that the United States was considering air-dropping food aid and other relief supplies in the face of the junta's resistance. Because an air drop would have involved an invasion of sovereign air space, R2P would still be required in the event to justify the effort. Notwithstanding, an air drop is potentially less confrontational than sending in ground troops bearing both aid and arms. This is presumably why air drops were considered despite the fact that they are "not the most efficient manner in terms of providing relief assistance." For the same reasons, the international community may be more open to the application of R2P, here, as a measure short of a full military response may yet be a comparatively effective option under these circumstances, and the potential political cost should intervention turn out to be a mistake would also be reduced accordingly.

too happy to 'wait and see' how the Sudan government will respond to the several U.N. resolutions instead of responding with force after the lessons of Rwanda and Bosnia. See Gareth Evans, Darfur and the Responsibility to Protect, http://www.crisisgroup.org/home/index.cfm?id=2915&l=1 (last visited Jan. 24, 2009).


216. See id.

217. Id. (quoting Ky Luu, director of the U.S. Office of Foreign Disaster Assistance).
The idea is that such a graduated approach would acculturate the international community to the concept of R2P so that it will, in fact, be prepared to respond with force when the next Rwanda or Srebrenica, or Darfur for that matter, presents itself.

VI. CONCLUSION

In reconfiguring the terms of the debate, the constructive interpretation of R2P not only moves the discussion beyond the impasse created by the reference to natural disasters; it reconceptualizes R2P by placing the responsibility on the international community to respond not just to a government’s failure to protect its people from the affirmative commission of mass atrocities, but also from large-scale harm based on omission where the failure to act also constitutes a crime against humanity under international law.

Cast in these terms, R2P would plainly not be limited to situations involving natural disasters with respect to omission-based intentional failures. Rather, R2P would apply to any scenario that implicates such failures, which could just as well play out in the context of environmental disasters or global pandemics, for instance. While the knee-jerk reaction might be to raise the perennial slippery slope argument, that potential objection is met by the fact that safeguards inherent in both the doctrine’s definition and modus operandi will constrain the application of R2P accordingly.

As against the perceived risks of adopting the constructive interpretation of R2P, the distinct benefits would include a resulting analytical framework that gives R2P greater internal consistency—not least because it is in step with prevailing international criminal jurisprudence—as well as moral credence. Additionally, as a political matter, the fact that the constructive interpretation stays true to its definition should allay concerns about the potential for abusing the doctrine. Moreover, adopting the constructive interpretation may better foster international support for the doctrine to the extent it allows for an incrementalist approach built on effective and visible responses that, nonetheless, fall short of the categorical use of force. Finally, it bears emphasis that R2P is at least as much at risk of being diminished from underuse as it is from overuse. As things stand with the experience in Darfur, however, the former is proving to be the more formidable danger.